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No. 80-1121

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 5 U.S.C. 5334(b), which entitles a promoted or transferred government employee to an automatic two-step increase in pay, is applicable to respondents' promotions from positions in the prevailing-rate Wage System (WS) to positions in the General Schedule (GS).

PARTIES TO THE PROCEEDING

The original plaintiffs in this action were Joseph J. Clark, Frank D'Aversa, Nicholas J. Libretto, Nicholas J. Proto, Carlo Scialpi, and Albert Wolfus. Clark and Proto are now deceased; they are represented herein by their widows, Margaret Devine Clark and Annette Kurtzman Proto.

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OPINIONS BELOW

The opinion of the Court of Claims on the issue of liability (Pet. App. 1a-8a) is reported at 599 F.2d 411. The order of the Court of Claims determining the amount of respondents' recovery (Pet. App. 9a-14a) is unreported.

JURISDICTION

The opinion of the Court of Claims on the issue of liability was rendered on May 16, 1979. A timely petition for rehearing was denied on September 28, 1979 (Pet. App. 15a-16a). The judgment of the Court of Claims awarding monetary recovery to respondents was entered on August 8, 1980 (Pet. App. 9a). On October 28, 1980, the Chief Justice extended

the time for filing a petition for a writ of certiorari to and including January 5, 1981. The petition for a writ of certiorari was filed on that date and was granted on March 23, 1981 (J.A. 71). The jurisdiction of this Court rests upon 28 U.S.C. 1255. See *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to the petition (Pet. App. 17a-22a).

STATEMENT

1. This case involves two of the principal pay systems for federal employees—the General Schedule (GS), 5 U.S.C. (& Supp. III) 5331 *et seq.*, and the prevailing-rate Wage System (WS), 5 U.S.C. (& Supp. III) 5341 *et seq.*

Except as otherwise provided, "all civilian positions and employees in or under an agency" fall within the General Schedule. 5 U.S.C. 5102(b); see also 5 U.S.C. 5331. The General Schedule covers most federal white-collar positions. See R. Vaughn, *Principles of Civil Service Law* § 6.2(a), at 6-4 (1976). There are approximately 1.4 million full-time employees in the General Schedule. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1980*, at 283, Table No. 474 (1980) ("1980 Statistical Abstract").

The General Schedule comprises 18 grades. See 5 U.S.C. 5104 and 5332. A grade

> includes all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to—
>
> (A) level of difficulty and responsibility; and

(B) level of qualification requirements of the work;

to warrant their inclusion within one range of rates of basic pay in the General Schedule.

5 U.S.C. 5102(a)(5); see also 5 U.S.C. 5106(b). In turn, each grade is divided into rates of pay, or steps. See 5 U.S.C. 5332. GS salaries are determined pursuant to the principles of comparability set forth in the Federal Pay Comparability Act of 1970. See 5 U.S.C. 5301. The salary level for a given GS grade and step is uniform nationwide. See 5 U.S.C. 5332.

In contrast to the General Schedule, the Wage System is applicable to federal blue-collar workers. See 5 U.S.C. 5342(a)(2)(A); C. Goodman, *Handbook on Public Personnel Law* 147 (1978); Vaughn, *supra*, § 6.2(b), at 6-17.[1] By definition, WS positions are excluded from the General Schedule. See 5 U.S.C. 5102(c)(7), 5331, 5342(a)(2)(A). The Wage System encompasses approximately 456,000 full-time employees. See 1980 Statistical Abstract, *supra*, at 283, Table No. 474. Rates of pay under the Wage System are based on a wage survey of prevailing rates for comparable work in the local wage area. See 5 U.S.C. 5341, 5343. Thus, unlike the General Schedule, WS rates are determined for each locality and vary across the country.[2]

2. Respondents are six present and former employees of the Supervisor of Shipbuilding, Conversion

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[1] Wage System employees are generally laborers, craftsmen, and tradesmen, such as truck drivers, welders, aircraft mechanics, carpenters, tool and diemakers, electricians, and plumbers. Approximately 80% of WS employees work for the Department of Defense. See H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971); S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972).

[2] The history of the Wage System is discussed in Vaughn, *supra*, § 6.2(b), at 6-18 to 6-20.

and Repair, Department of the Navy. Between July 1973 and October 1974, they were shifted from supervisory positions in the prevailing-rate Wage System to positions under the General Schedule.[3]

Incident to these changes in position, respondents' new salaries were calculated pursuant to the provisions of 5 U.S.C. 5334(a) and the Civil Service Commission (CSC) "highest previous rate" rule, which provides that

> when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate.

5 C.F.R. 531.203(c) (Pet. App. 20a).[4] Each respondent's highest previous rate fell between two steps of his new GS grade and, in accordance with general

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[3] Respondents' changes of position were as follows: Clark, from a WS ship surveyor (shipfitter) to a GS quality assurance specialist (process) (J.A. 37); D'Aversa, from a WS ship surveyor (pipefitter) to a GS production controller (shipbuilding) (J.A. 29, 33); Libretto, from a WS ship surveyor (machinist) to a GS engineering technician (drafting) (J.A. 35); Proto, from a WS ship surveyor (electrician) to a GS production controller (shipbuilding) (J.A. 23) and later to a GS contract negotiator (J.A. 27); Scialpi, from a WS ship surveyor (shipfitter) to a GS contract negotiator (J.A. 15); and Wolfus, from a WS ship surveyor (machinist) to a GS contract negotiator (J.A. 19).

[4] In 1979, the Civil Service Commission was succeeded by the Office of Personnel Management (OPM). See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. III) 1101 *et seq.*; see also *United States* v. *Clark*, 445 U.S. 23, 25 n.1 (1980).

Navy policy,[5] he was given the higher salary level. In this way, respondents received a salary increase upon their appointment to a position in the General Schedule.

Although the "highest previous rate" rule was applied in the case of each respondent, two different methodologies were initially used in making the requisite calculations.[6] After learning of this discrepancy,

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[5] By regulation, the Navy has elected to place employees at the higher of the two GS rates in all cases where it serves the interest of the government. See Civilian Manpower Management Instruction 531.S2 (June 26, 1974).

[6] See J.A. 42-43. With respect to respondent Libretto, the "highest previous rate" rule was correctly applied to his existing WS salary. In contrast, the GS salaries of the other respondents were originally determined by first applying the provision of Subchapter S8-3d of the CSC Federal Personnel Manual System (FPM), *Federal Wage System*, Supplement 532-1 (Inst. 8, Jan. 16, 1973) (Pet. App. 21a-22a), which stated that an employee promoted to a Wage System position is entitled to be paid at the lowest scheduled rate that exceeds his existing rate of pay by no less than a one-step increment of the category from which he was promoted. Once this adjustment had been made, the new GS salaries of these respondents were computed by applying the "highest previous rate" rule of 5 C.F.R. 531.203(c) to the adjusted rates of pay. Thus, each of these respondents was awarded two salary increases for a single change of position. This method of computation was in error, because Subchapter S8-3d and the "highest previous rate" rule of 5 C.F.R. 531.203(c) are not applicable to the same personnel action: Subchapter S8-3d covers promotions to a WS position, while the "highest previous rate" rule pertains to changes from a WS position to a GS position.

We note that Subchapter S8-3d of Supplement 532-1 was recently amended to provide for an increase of 4% of the representative rate of the previous grade instead of a one-step increase. See Federal Personnel Manual System, *Fed-*

respondent Libretto filed an appeal with the Navy in November 1974, claiming that he was entitled to the higher GS salary received by the other respondents (J.A. 47-51). The Navy rejected this contention on the ground that respondent Libretto's GS salary had been properly determined (J.A. 44-45, 52-53). The Navy also concluded that the salaries of the other respondents were erroneous, and accordingly it notified them that their salaries would be reduced to the correct levels based on the formula utilized in the case of respondent Libretto (J.A. 44-45, 54-57; Pet. App. 2a).

Respondents unsuccessfully pursued their administrative remedies (J.A. 58-64), and on January 29, 1976, they commenced this suit in the Court of Claims under the Tucker Act (28 U.S.C. 1491) and the Back Pay Act of 1966 (5 U.S.C. 5596). Challenging the applicability of the "highest previous rate" rule, respondents contended that they were entitled to a two-step increase in pay pursuant to 5 U.S.C. 5334(b), which reads in pertinent part (Pet. App. 19a):

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

Respondents sought an award of back pay and a correction of their employment records in accordance

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eral Wage System, Supplement 532-1, Subchapter S8-3d (Inst. 17, Apr. 14, 1980); see also 46 Fed. Reg. 21343, 21350 (1981) (to be codified in 5 C.F.R. 532.407). This amendment does not affect the question presented in this case.

with Section 5334(b).[7] The government opposed respondents' claims on the ground that Section 5334(b) applies only to promotions within the General Schedule and therefore did not extend to respondents' shift between the Wage System and the General Schedule.

On cross-motions for summary judgment, the Court of Claims held (Pet. App. 1a-8a) that 5 U.S.C. 5334(b) is applicable to promotions from a position within the Wage System to a position under the General Schedule. Focusing on the word "promoted" in the statute (Pet. App. 4a-5a), and emphasizing that respondents had been "promoted" within the meaning of 5 C.F.R. 531.202(h)(2) (Pet. App. 4a & n.5), the court found that respondents were entitled to a two-step salary increase under Section 5334(b). In addition, relying on the fact that a promotion within the GS system gives rise to a two-step increase, and believing that "[a]n employee promoted within the WS receives a comparable benefit; even an employee promoted 'criss-cross' from GS to WS receives the benefit" (Pet. App. 7a), the court concluded that Congress must have intended a like rule to apply to promotions from the Wage System to the Gen-

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[7] On its face, 5 U.S.C. 5334(b) entitles the employee to a GS salary that "exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Thus, the Court of Claims clearly misunderstood the operation of Section 5334(b) when it stated (Pet. App. 1a n.1) that the statutory increase was measured by two steps of the new grade to which the employee was promoted rather than of the former grade from which he was promoted. The amount of recovery for each respondent specified in the final judgment, which was based on a stipulation between the parties (Pet. App. 9a-14a), reflects the correct computation under Section 5334(b).

eral Schedule (*id.* at 8a). Accordingly, the court invalidated, as inconsistent with the statute, the OPM regulation that construed Section 5334(b) to be limited to transfers or promotions within the General Schedule:

> The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade.

5 C.F.R. 531.204(a)(1) (Pet. App. 20a).

Based on this decision, the case was remanded to the Trial Division of the Court of Claims for a determination of the total payment due each respondent. The government's motion for rehearing on the issue of liability was denied (Pet. App. 15a-16a). Thereafter, the parties stipulated to the amount of respondents' recovery, and final judgment was entered on August 8, 1980 (*id.* at 9a-14a).

SUMMARY OF ARGUMENT

The Court of Claims' holding that all employees promoted from the prevailing-rate Wage System to the General Schedule are entitled to a two-step increase in pay is inconsistent with the plain language of the relevant statute. 5 U.S.C. 5334(a) provides that, in the circumstances of this case, "[t]he rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management * * *." Respondents' salaries were thus subject to the "highest previous rate" rule set forth in 5 C.F.R. 531.203(c).

OPM's express authority to fix the rate of pay of employees in respondents' situation was not superseded by the limited exception contained in 5 U.S.C.

5334(b). Section 5334(b) provides that "an employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Since the word "grade" is defined in terms of "classes of positions * * * inclu[ded] within one range of rates of basic pay *in the General Schedule*" (5 U.S.C. 5102(a)(5) (emphasis added)), the applicability of Section 5334(b) is explicitly confined to promotions within the General Schedule and does not extend to respondents' change of position from the Wage System to the General Schedule.

The legislative history and purpose of Section 5334(b) confirm that the statute is restricted to promotions within the General Schedule. Because of the overlap in salary scales for consecutive GS grades, the upper salary levels in any given grade exceed the beginning levels in the next higher grade. Hence, a promotion in grade would not necessarily result in a pay raise even though the new position entailed a higher "level of difficulty * * *[,] responsibility[,] and * * * qualification requirements * * *" (5 U.S.C. 5102(a)(5)). Section 5334(b) was designed to ensure that "a promotion in duties and responsibilities" would be accompanied by "a promotion in pay." H.R. Rep. No. 1264, 81st Cong., 1st Sess. 12 (1949); S. Rep. No. 847, 81st Cong., 1st Sess. 38 (1949).

These considerations have no bearing in the case of a change of position between the Wage System and the General Schedule. First, because the Wage System involves an entirely separate pay structure based on periodic reviews of prevailing rates in the locality, there is no necessary overlap between WS

and GS salaries. Second, unlike a change of position within the General Schedule, a change from the Wage System to the General Schedule does not invariably reflect a "promotion" in the customary sense of advancement to "greater responsibilities or more difficult duties" (H.R. Rep. No. 1264, *supra*, at 12). Third, while the absence of an automatic salary increase might seriously discourage GS employees from moving to higher grades, there exist a number of other incentives for a WS employee to accept a GS position. Accordingly, it was unnecessary for Congress to provide an automatic pay increase for WS employees who shift into the General Schedule.

Finally, the Court of Claims' construction of Section 5334(b) is contrary to the interpretation that the agencies responsible for proposing and administering the statute have consistently followed since the time of enactment. On several occasions this interpretation has been brought to the attention of Congress, which has confirmed the correctness of the agencies' position.

ARGUMENT

5 U.S.C. 5334(b), WHICH REQUIRES A TWO-STEP PAY INCREASE FOR EMPLOYEES "PROMOTED * * * TO A POSITION IN A HIGHER GRADE," IS INAPPLICABLE TO CHANGES OF POSITION FROM THE WAGE SYSTEM TO THE GENERAL SCHEDULE

A. The Plain Language Of The Statute Demonstrates That Section 5334(b) Is Applicable Only To Those Promotions That Occur Within The General Schedule

This Court has repeatedly emphasized that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that lan-

guage must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also, *e.g.*, *United States* v. *Albernaz*, No. 79-1709 (Mar. 9, 1981), slip op. 3; *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). "That a law is the best expositor of itself * * * [is] among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged." *Pennington* v. *Coxe*, 6 U.S. (2 Cranch) 33, 52-53 (1804) (Marshall, C.J.).

Here, the language of the statute clearly indicates that a two-step salary increase is not required for changes of position from the Wage System to the General Schedule. By its terms, 5 U.S.C. 5334(a) provides that, in the circumstances of this case, "[t]he rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission] in conformity with this subchapter and chapter 51 of this title * * *" (Pet. App. 18a).[8] Pursuant to this provision and 5 U.S.C. 5338, the Civil Service Commission promulgated the "highest previous rate" rule, 5 C.F.R. 531.203(c), to determine the new rate of pay "when an employee is reemployed, transferred, reassigned, promoted, or demoted" in the General Schedule (Pet. App. 20a). Under this rule, the Navy was authorized to pay each respondent "any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate" (*ibid.*). Thus, the

[8] The Court of Claims agreed (Pet. App. 3a n.4) that 5 U.S.C. 5334(a) is applicable to respondents' promotion from the Wage System to the General Schedule.

General Schedule salary of each respondent was properly computed to be the higher of the two GS rates between which his highest previous rate fell.[9]

Contrary to the analysis of the Court of Claims, OPM's express authority under Section 5334(a) to set standards governing GS rates of pay is not superseded here by the limited exception contained in 5 U.S.C. 5334(b). Section 5334(b) provides (Pet. App. 19a) that "[a]n employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Under 5 U.S.C. 5102(a)(5) and 5 U.S.C. 5331(a), the word "grade" is defined to include (Pet. App. 17a) "all classes of positions which * * * are sufficiently equivalent * * * to warrant their inclusion within one range of rates of basic pay *in the General Schedule*" (emphasis added). See also 58 Comp. Gen. 181, 182 (1978). Hence, Section 5334(b) is explicitly confined to promotions from one GS position or grade to another and is inapplicable to promotions, as in the present case, from the Wage System to the General Schedule.

The Court of Claims' construction of 5 U.S.C. 5334(b) rests principally (Pet. App. 4a-8a) on the word "promoted" in the statute and the fact that respondents received a "promotion" under 5 C.F.R. 531.202(h)(2) (Pet. App. 19a-20a) in changing from WS to GS positions. This analysis is incorrect for

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[9] Respondents have never challenged the particular calculations made under the "highest previous rate" rule, but rather have contended only that the rule is not applicable in this case at all.

several reasons. First, as discussed above, the salient inquiry under Section 5334(b) is not whether an employee was promoted, but whether the promotion occurred between GS positions or grades. Thus, insofar as relevant here, a promotion is a necessary but not a sufficient condition for an automatic two-step increase. By narrowly focusing on only one portion of the statute, the court distorted the manifest meaning of Section 5334(b).

In addition, as the Court of Claims appeared to recognize (Pet. App. 3a & n.4), Section 5334(a) is itself applicable to promotions.[10] Hence, the existence of a promotion *vel non* cannot serve to distinguish the applicability of Sections 5334(a) and 5334(b). Instead, the critical distinction is whether the promotion was within the General Schedule.

Moreover, contrary to the approach of the Court of Claims, the characterization of the personnel actions in this case as promotions is the conclusion rather than the starting point of analysis. 5 C.F.R. 531.202(h)(2), upon which the Court of Claims relied (Pet. App. 4a & n.5), provides in pertinent part that a "'[p]romotion' means a change of an employee, while continuously employed, from * * * [a] lower rate paid under * * * [a non-GS system] *to a higher rate* within a General Schedule grade" (*id.* at 19a-20a; emphasis added). Accordingly, respondents nominally were "promoted" only because appli-

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[10] As explained in the legislative history of the statute, 5 U.S.C. 5334(a) "authorizes the Commission to issue regulations governing the rate of basic compensation which an employee may be paid on transfer, *promotion*, demotion, reinstatement, reemployment, or other personnel change." H.R. Rep. No. 1264, 81st Cong., 1st Sess. 12 (1949) (emphasis added).

cation of the "highest previous rate" rule resulted in an increase in their basic rates of pay.[11] Since a "promotion" thus turns on the level of the GS salary that is ultimately set, it is simply illogical to seek to apply Section 5334(b) to determine that salary in the first instance, as the court below did, based on the existence of a "promotion."[12]

Indeed, it is especially anomalous to find, as in this case, that an automatic two-step increase is required solely because the government exercised its discretion to allow an initial increase under the "highest previous rate" rule and thereby gave respondents a "promotion." See also 59 Comp. Gen. 209, 212 (1980); 50 Comp. Gen. 414, 417 (1970). If the Navy had elected not to afford each of the respondents the higher GS rate, their changes of position would have involved reductions in pay and thus been designated as "demotions" under 5 C.F.R. 531.202(a)(2). In those circumstances, there would be no basis whatever for the Court of Claims' conclusion that respondents are entitled to an automatic salary in-

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[11] On the other hand, a "promotion" within the General Schedule is defined to be "a change of an employee, while continuously employed, from * * * [o]ne General Schedule grade to a higher General Schedule grade." 5 U.S.C. 531.202(h)(1) (Pet. App. 19a-20a). Unlike Section 531.202(h)(2), this provision does not depend on the new rate of pay and therefore can be used to ascertain the applicability of 5 U.S.C. 5334(b) to a personnel change within the General Schedule.

[12] Furthermore, as will be discussed below (see pages 20-21, *infra*), a change of position from the Wage System to the General Schedule, in contrast to a change within the General Schedule, does not necessarily entail a "promotion" in terms of a higher level of difficulty, responsibility, or qualifications.

crease as "promoted" employees. Hence, the decision below rests entirely on the fact that the government chose to grant respondents a higher salary pursuant to the "highest previous rate" rule.

For these reasons, the plain language of the statute demonstrates that 5 U.S.C. 5334(b) is applicable only to promotions within the General Schedule, and the Court of Claims thus erred in applying Section 5334(b) to respondents' changes of position from the Wage System to the General Schedule.[13]

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[13] In addition, the Court of Claims erred in stating (Pet. App. 7a & n.13) that the government conceded that an employee promoted within the Wage System or from the General Schedule to the Wage System is entitled to an increase "comparable" to the two-step increase provided by Section 5334(b) for an employee promoted within the General Schedule. In those contexts, a "promotion" is defined in terms of a change of position to a higher level within the same type wage schedule regardless of the resulting increase or decrease in actual pay for the individual employee (because of the local variation in WS rates), or a change to a position with a higher *representative* rate in a different pay schedule regardless of the increase or decrease in the actual pay of the individual employee. FPM Supplement 532-1, Subchapter S8-2a(7) (Apr. 14, 1980) (Pet. App. 20a-21a). As the government explained in its cross-motion for summary judgment (page 11) and in its petition for rehearing en banc (pages 4-5), an employee promoted either within the Wage System or from the General Schedule to the Wage System receives a one-step increase pursuant to Subchapter S8-2a(7) and S8-3d of FPM Supplement 532-1 (Pet. App. 20a-22a; see also page 5 note 6, *supra*); an employee who is transferred or reassigned but not promoted within the meaning of Subchapter S8-2a(7) may receive an increase only in accordance with the "highest previous rate" rule of Subchapter S8-3c (Pet. App. 21a). See also 46 Fed. Reg. 21343, 21350 (1981) (to be codified in 5 C.F.R. 532.401, 532.405, 532.407). Moreover, these increases are not required by stat-

B. The Legislative History And Purpose Of Section 5334(b) Confirm That It Is Limited To Promotions Within The General Schedule

The legislative history of 5 U.S.C. 5334(b) reveals that it was intended to address a narrow and specific problem relating to promotions within the General Schedule. In light of this history, Section 5334(b) should be construed, consistent with its plain language, to be inapplicable to promotions from the Wage System to the General Schedule.

The provision for an automatic salary increase now found in 5 U.S.C. 5334(b) was originally enacted in the Classification Act of 1949, ch. 782, Section 802(b), 63 Stat. 969-970, 5 U.S.C. (1952 ed.) 1132(b).[14] The congressional reports accompanying this provision explained that, "[a]t present, a promoted employee receives no immediate increase [under the 'highest previous rate' rule] if he is already receiving a rate *in the lower grade* that also occurs in the higher grade. * * * In too many cases, accordingly, an employee who is promoted to greater responsibilities or more difficult duties receives no immediate increase in pay. * * * Subsection (b) of section 802 corrects this situation." H.R. Rep. No. 1264, 81st Cong., 1st Sess. 12-13 (1949) (emphasis added); S. Rep. No. 847, 81st Cong., 1st Sess. 38 (1949) (emphasis added).[15]

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ute, but instead have been established by OPM in the exercise of its discretion under 5 U.S.C. 5343(c)(5). Thus, the court's discussion in this regard reflects a fundamental misunderstanding of the Wage System.

[14] This section initially provided for a one-step salary increase, but it was amended in 1962 to specify a two-step increase. See page 28, *infra*.

[15] This explanation was taken verbatim from a statement submitted by the Civil Service Commission in support of

The underlying cause of this problem was the overlap in salary scales for consecutive GS grades. Thus, the upper salary levels in any given grade were above the beginning levels in the next higher grade.[16] Accordingly, a promotion in grade would not necessarily result in a pay raise for the employee. To rectify this problem, Congress added the provision for an automatic salary increase to ensure that "a promotion in pay" would be incident to "a promotion in duties and responsibilities." H.R. Rep. No. 1264, *supra*, at 12; S. Rep. No. 847, *supra*, at 38.

The background and purpose of the provision for an automatic salary increase are most clearly explained in the legislative history of the 1962 amendment to the statute.[17] As a representative of the Civil Service Commission stated:

> [T]he Classification Act * * * requires that in a promotion from one grade to another, a person shall be advanced in salary not less than and not more than the equivalent of one pay step in the grade from which he is being promoted. At the time this was drawn in the Classification Act of 1949, this was a little bit of an advance over what existed before that time.
>
> The point is that so many people will have served several years in a particular grade and

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the legislation. See *Salaries of Federal Government Employees: Hearings on S. 558, S. 559, S. 1762, S. 1772, S. 1790 and Other Bills Before Subcomm. No. 5 of the Senate Comm. on Post Office and Civil Service*, 81st Cong., 1st Sess. 35, 45 (1949) (hereinafter "*1949 Senate Hearings*").

[16] See *1949 Senate Hearings*, *supra*, at 108-109, 149-150 (1949). See also S. Rep. No. 1113, 80th Cong., 2d Sess. 4 (1948).

[17] See page 16 note 14, *supra*.

> reach a pay step which, because of the way the grade structure is set up, will be very close to or may even overlap the entrance step of the next higher grade. If this employee served long enough in that lower grade, he actually could be getting a salary that is almost at or even above the entrance salary of the higher grade. Therefore, the 1949 act had this provision that he should have the equivalent of at least one step when he is promoted from one grade to the other grade.

Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted: Hearing Before the House Comm. on Post Office and Civil Service, 86th Cong., 2d Sess. 12-13 (1960) (statement of O. Glenn Stahl) (hereinafter "*1960 House Hearings*"). This explanation was again presented by the Commission in a subsequent congressional hearing on the 1962 legislation:

> Under the Classification Act of 1949, which is the act as it now stands, it had been provided that when an employee was at any particular rate, within a range of rates, for his grade and was then promoted to the next grade, he was entitled, upon being promoted, to go to a rate in the next grade that was at least as high as the amount of a step increase within his old grade. This was necessary because the rate ranges in the grades overlapped.
>
> Of necessity, you cannot have a broad rate range for a grade—so that people can progress within their grade in salary—without its overlapping the next rate range or the next grade a little bit at least. Otherwise, you would have to have very wide differentials between grades. That provision was in there to make the promotion somewhat meaningful.

Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted: Hearing on H.R. 1010 and H.R. 2015 Before the House Comm. on Post Office and Civil Service, 87th Cong., 1st Sess. 6-7 (1961) (statement of Mr. Stahl) (hereinafter "*1961 House Hearings*"). See also *id.* at 13 (statement of Vaux Owen, National Federation of Federal Employees).[18]

The considerations giving rise to the provision for an automatic salary increase have no bearing in the case of a change of position between the Wage System and the General Schedule. First, because the Wage System involves an entirely separate pay structure based on prevailing rates in the local wage areas, there is no necessary overlap between WS and GS salaries. Indeed, since WS rates vary across the country, the relationship between WS and GS salaries will depend on the locality in which the WS worker is employed; thus, for different employees, an identical change from a given WS position to a given GS position could entail a greater salary, a lesser salary, or the same salary. Likewise, this relationship will vary over time as WS "rates * * * move freely with * * * prevailing rates in industry." S. Rep. No. 2120,

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[18] These statements echo the observations in a congressional report on a predecessor bill to the Classification Act of 1949:

> Moreover, when employees are promoted by being assigned to work of greater difficulty or responsibility, they may, because they are already receiving a rate in their present grade which corresponds to a standard rate in a higher grade, be promoted without any immediate change in rate of pay. It would be better if some increase in pay could be made simultaneously with permanent reassignment to more difficult or more responsible work in a higher grade.

S. Rep. No. 1113, 80th Cong., 2d Sess. 4 (1948).

87th Cong., 2d Sess. 5 (1962).[19] In these circumstances, there was no reason for Congress to require an automatic pay increase for every WS employee who is promoted into the General Schedule.

Furthermore, a change from the Wage System to the General Schedule, unlike a change of position within the General Schedule, does not invariably entail a "promotion" in the customary sense of increased duties or enhanced ability. With respect to the General Schedule, a "grade" is defined to "include[] all classes of positions which * * * are sufficiently equivalent as to (A) level of difficulty and responsibility[,] and (B) level of qualification requirements of the work[,] to warrant their inclusion within one range of rates of basic pay in the General Schedule." 5 U.S.C. 5102(a)(5); see also 5 U.S.C. 5101(1)(B). By definition, therefore, a change from one GS grade to a higher GS grade inherently involves an advancement. In contrast, no similar relationship exists for a change from the Wage System to the General Schedule. Nor can a general comparison be drawn between the responsibilities and qualifications of a blue-collar WS position and those of a white-collar GS position. Hence, because the movement of employees from the Wage System to the General Schedule does not implicate the policy that "a promotion in duties and

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[19] See also *1961 House Hearings, supra*, at 16 (statement of O. Glenn Stahl):

> [For] blue collar workers * * * [,] wages are set in accordance with prevailing rates of pay in a given locality and * * * pay adjustments are made at least annually and are very promptly and pretty accurately responsive to economic shifts that take place in pay in private industry.

Full-scale wage surveys are now conducted every two years, with interim surveys held between the full reviews. 5 U.S.C. 5343(b).

responsibilities" should be accompanied by "a promotion in pay" (see page 17, *supra*), such personnel actions fall outside the scope of Section 5334(b) and do not call for an automatic salary increase.

Finally, absent the provision for an automatic salary increase, GS employees might be seriously discouraged from accepting the greater responsibilities and more demanding duties of the position in the higher grade. Indeed, because the General Schedule affords periodic salary increases within each grade (5 U.S.C. 5335), the lack of an automatic salary increase upon a promotion would mean that an employee could receive a larger pay raise by remaining in grade for an additional period than by moving to the next grade. See *1961 House Hearings, supra*, at 7 (statement of O. Glenn Stahl), 12 (statement of John McCart, American Federation of Government Employees). Such disincentives do not obtain in the case of a change in position between the Wage System and the General Schedule. Entirely apart from salary, there are a number of considerations that could encourage this change by a WS employee—for example, the enhanced prestige of a white-collar job, better working conditions, and a greater opportunity for future advancement. Moreover, even without an *automatic* two-step salary increase,[20] a WS worker might nevertheless anticipate a higher salary in the GS position—for instance, where he has reached the maximum pay rate for his WS job.[21]

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[20] We note that in most cases, as occurred here (see page 5, *supra*), a change of position from the Wage System to the General Schedule will result in an increase in salary under the "highest previous rate" rule.

[21] Unlike the 10 steps or rates of pay in each GS grade (see 5 U.S.C. 5332 (chart)), the Wage System currently

Accordingly, it is unnecessary to apply Section 5334(b) to changes of position from the Wage System to the General Schedule in order to serve the purpose of the statute to encourage General Schedule employees to accept the greater responsibilities and more difficult duties of a higher GS position.[22]

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has only five rates for each position (see 5 U.S.C. 5343 (c)(2)) and before 1972 had only three rates (see H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971); S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972)). In addition, the range of pay in a GS grade is approximately 30% of the base rate, but the range in the Wage System is only approximately 16% (and traditionally was only approximately 8%). See 5 U.S.C. 5332 (chart), 5343(e)(2)(A-C); 117 Cong. Rec. 27674 (1971) (remarks of Rep. Hillis); *id.* at 27685 (remarks of Rep. Brasco). And the periodic step-increases in the Wage System occur considerably more quickly than in the General Schedule (compare 5 U.S.C. 5335(a)(1-3) with 5 U.S.C. 5343(e)(2)(A-C)). As a result, the maximum rate of pay for a position is more often reached, and in a far shorter time, by a WS employee than a GS employee. Therefore, many WS employees find themselves in "'dead end' jobs." 117 Cong. Rec. 27684 (1971) (remarks of Rep. Hanley). In 1971, it was estimated that 90% of federal blue-collar workers had obtained the highest of the available pay steps, and many did so in only two years. *Id.* at 27674 (remarks of Rep. Hillis); *id.* at 27681 (remarks of Rep. Matsunaga); *id.* at 27685 (remarks of Rep. Brasco).

[22] We also note that the legislative record of Section 5334(b) refers on several occasions to the fact that Federal blue-collar workers are covered by the separate Wage System rather than the General Schedule, but at no time was it ever suggested that such employees moving into a GS position would be entitled to an automatic salary increase. See, *e.g.*, H.R. Rep. No. 1264, *supra*, at 3, 6, 21; 95 Cong. Rec. 13487 (1949) (remarks of Rep. Rees); *1949 Senate Hearings*, *supra*, at 1 (statement of Ismar Baruch, Civil Service Commission), 113 (statement of Luther C. Steward, National Federation of Federal Employees), 152 (statement of John

C. The Agencies Responsible For Proposing And Administering Section 5334(b) Have Consistently Construed It To Apply Only To Promotions Within The General Schedule, And Congress Has Confirmed The Correctness Of That Construction

In addition to finding support in the statutory language and legislative history, the construction of 5 U.S.C. 5334(b) to apply only to promotions within the General Schedule represents the contemporaneous and consistent interpretation adopted by the agencies responsible for the formulation and administration of the statute. Moreover, the validity of this construction has been recognized and confirmed by Congress.

As noted above (see page 16 & note 14, *supra*), the provision for an automatic salary increase was originally contained in Section 802(b) of the Classification Act of 1949. The bills that led to the Classification Act, including Section 802, were drafted and submitted to Congress by the Civil Service Commission. See S. Rep. No. 847, 81st Cong., 1st Sess. 1, 38 (1949); 95 Cong. Rec. 5568 (1949) (remarks of Sen. Long). As adopted, the Act, and particularly the title containing Section 802, were "entirely in accord with the Commission's views." H.R. Rep. No. 1264, 81st Cong., 1st Sess. 20 (1949); see also *id.* at 4, 19; S. Rep. No. 847, *supra*, at 46.

In first implementing the Act, the Civil Service Commission promulgated regulations providing that "[a]n employee promoted, repromoted or transferred

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G. Yaden, American Federation of Government Employees), 257 (statement of N.P. Alifas, International Association of Machinists), 357 (statement of Orrin A. Bullows, International Brotherhood of Electrical Workers); *1961 House Hearings, supra*, at 16 (statement of O. Glenn Stahl).

to a higher grade *between Classification Act positions*, shall receive * * * [the automatic salary increase]." 5 C.F.R. 25.104(a), 15 Fed. Reg. 1236 (1950) (emphasis added). Unless the promotion or transfer occurred within the Classification Act system, it was subject to the "highest previous rate" rule applicable to "an employee who is reemployed, transferred, reassigned, promoted, repromoted, or demoted * * *" from a different pay system to a position under the Classification Act. See 5 C.F.R. 25.103(b), 15 Fed. Reg. 1235 (1950). Since prevailing-rate positions were excluded from the Classification Act (see ch. 782, Pub. L. No. 429, Section 202(7), 63 Stat. 954-955, 5 U.S.C. (1952 ed.) 1082(7)), an employee transferred or promoted from such a position to a Classification Act position was covered by the "highest previous rate" rule and was not entitled to an automatic step increase in pay.

Subsequent revisions to the regulations have consistently adhered to the construction that the provision for an automatic salary increase is inapplicable to transfers or promotions from a prevailing-rate position to a Classification Act or General Schedule position.[23] Likewise, the General Accounting Office,

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[23] See, *e.g.*, 5 C.F.R. 25.104(a), 15 Fed. Reg. 7868 (1950) ("[a]n employee promoted, repromoted or transferred to a higher grade between Classification Act positions or grades"); 5 C.F.R. 25.104(a), 25 Fed. Reg. 7147 (1960) ("[t]he requirements of Section 802(b) of the [Classification] Act apply in repromotion actions and in transfers involving promotions between Classification Act grades"); 5 C.F.R. 531.204(a)(1), 28 Fed. Reg. 10948 (1963) ("[t]he requirements of Section 802(b) of the [A]ct * * * apply in a transfer involving a promotion between Classification Act grades"); 5 C.F.R. 531.204(a), 33 Fed. Reg. 12450 (1968) ("[t]he requirements of Section 5334(b) of title 5, United States

which is authorized to settle and adjust "[a]ll claims and demands whatever * * * against [the Government of the United States]" (31 U.S.C. 71; see also 31 U.S.C. 72),[24] has uniformly recognized that the "highest previous rate" rule, rather than the automatic step-increase provision, governs transfers or promotions from a prevailing-rate position to a Classification Act or General Schedule position. See, *e.g.*, 59 Comp. Gen. 209, 210, 211 (1980); 58 Comp. Gen. 181, 182 (1978); 52 Comp. Gen. 695, 696 (1973); 52 Comp. Gen. 671, 672 (1973); Comp. Gen. decision B-170675 (Oct. 3, 1975) (unpublished); Comp. Gen. opinion B-172706.05 (KM) (Dec. 30, 1975) (unpublished) (J.A. 65-66); Comp. Gen. opinion B-172706 (Apr. 19, 1972) (unpublished) (J.A. 67); Comp. Gen. opinion B-157649 (Nov. 22, 1965) (unpublished).

In disregarding these administrative authorities, the Court of Claims plainly erred by failing to heed the " 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.' " *E.I. duPont de Nemours &*

Code, apply only (1) to a transfer from one General Schedule position to a higher General Schedule position, and (2) to a promotion from one General Schedule grade to a higher General Schedule grade").

[24] As Congress noted in connection with the predecessor of Section 5334(a), the regulations to be issued by the Civil Service Commission "would still be subject to decisions of the Comptroller General as to their legality and conformance with the other provisions of the bill." H.R. Rep. No. 1264, *supra*, at 12. See also 54 Comp. Gen. 435, 438 (1974) ("[GAO is] obligated by law to make final determinations regarding the legality of expenditures of appropriated funds").

Co. v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also, *e.g.*, *FCC* v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981), slip op. 15-16. This principle is particularly appropriate here in light of the "longstanding and consistent administrative interpretation" (*Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)) that " 'involves a contemporaneous construction of [the] statute by the [persons] charged with the responsibility of setting its machinery in motion' " (*Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-668 (1980), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933)). See also, *e.g.*, *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 9 n.17). Moreover, "[a]dministrative interpretations are especially persuasive where, as * * * [in this case], the agency participated in developing the provision" (*Miller* v. *Youakim*, 440 U.S. 125, 144 (1979)) and "suggested the provisions' enactment to Congress" (*United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549 (1940)).[25]

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[25] Even if there were some room for doubt about the correctness of this longstanding and consistent administrative construction, the agencies' interpretation is a reasonable one that the Court of Claims was bound to respect. " 'To sustain * * * [the agencies'] application of this statutory term, we need not find its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). Rather, "[it] is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971). And, in view of the "highly specialized and techni-

In addition, judicial deference to the agencies' interpretation of Section 5334(b) is strongly reinforced by the fact that " 'Congress has refused to alter the administrative construction.' " *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978), quoting *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 381. Where, as in this case, "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940). Here, "[i]n the [30 years] during which [the CSC and GAO have] consistently allowed * * * [mandatory salary increases only for promotions within the General Schedule], Congress has never expressed its disapproval, and its silence in this regard suggests its consent to [this] practice." *EEOC* v. *Associated Dry Goods Corp.*, *supra*, slip op. 9-10 n.17. And, in examining the statute and its administrative construction, "the views of subsequent Congresses * * * [confirming that construction] are entitled to significant weight." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980).

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cal" nature of the federal personnel system, the agencies' " 'specialized experience gives them an advantage judges cannot possibly have * * * in ascertaining the * * * standards by which they should administer it. Accordingly, their judgment in such matters should be overturned only where there is no reasonable basis to sustain it * * *.' " *Board of Governors of Federal Reserve System* v. *Investment Co. Institute*, No. 79-927 (Feb. 24, 1981), slip op. 9 n.21, quoting *Board of Governors* v. *Agnew*, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring).

As originally passed, the Classification Act required a one-step salary increase for promoted employees (see page 16 & note 14, *supra*). In 1962, the statute was amended to provide for a two-step increase. See Pub. L. No. 87-793, Section 604(a), 76 Stat. 847-848, 5 U.S.C. (1964 ed.) 1132(b). The congressional report on a predecessor bill to provide an automatic two-step salary increase expressly states that "[t]he objective of this bill is to make more realistic and more meaningful promotions *from one grade to a higher grade for employees under the Classification Act.*" H.R. Rep. No. 1981, 86th Cong., 2d Sess. 2 (1960) (emphasis added).[26] The reports on the bill that was later enacted into law reflect the same view. See S. Rep. No. 2120, 87th Cong., 2d Sess. 25 (1962) ("when an employee is promoted to a position in a higher grade he shall receive basic compensation at the lowest rate of the higher grade which exceeds his existing rate by not less than two-step increases *of the grade from which promoted*") (em-

[26] This bill was identical to the statute that Congress eventually adopted. An earlier version of the bill—H.R. 543, 86th Cong., 1st Sess. (1959)—had provided for an automatic salary increase of the difference between the minimum rates of the new grade and the former grade. See S. Rep. No. 1981, *supra*, at 2. Although the Civil Service Commission "agree[d] with the general objective of the[ ] bill[ ]" (*id.* at 3), it recommended that a two-step increase be substituted (*id.* at 4-5). The bill was amended in accordance with this proposal (*id.* at 1, 2), and in that form the provision for a two-step increase was subsequently enacted with the support of the Commission. See also *1960 House Hearings, supra*, at 2, 13 (statement of O. Glenn Stahl); *1961 House Hearings, supra*, at 2 (statement of Rep. Dulski), 3 (statement of Rep. Lesinski), 7 (statement of O. Glenn Stahl). Although the bills thus differed in the measure of the salary increase, no difference existed in terms of their coverage and applicability.

phasis added); H.R. Conf. Rep. No. 2525, 87th Cong., 2d Sess. 61 (1962) (same); H.R. Conf. Rep. No. 2532, 87th Cong., 2d Sess. 61 (1962) (same).

The congressional hearings preceding the 1962 legislation also clearly evince the understanding that the automatic salary increase is not applicable to employees promoted from the Wage System to the General Schedule. In considering an initial bill to amend the existing provision for a one-step salary increase (see page 28 note 26, *supra*), Representative Lesinski, the sponsor of the proposal, observed that it "would provide that *an individual covered by the Classification Act who is promoted* to a higher grade be attended by an increase in salary equal to the difference between the minimum rate *of grade from which promoted* and the minimum rate of grade to which promoted." *1960 House Hearings*, *supra*, at 1 (emphasis added). See also *id.* at 29 (statement of Rep. Roosevelt) ("an employee *whose position is subject to the Classification Act* is required to receive upon promotion to a higher grade * * * [an automatic salary increase]") (emphasis added). O. Glenn Stahl of the Civil Service Commission reiterated that the provision for an automatic salary increase applies to "a promotion from one grade to another" (*id.* at 12; see also *id.* at 14) and concerns only those "[e]mployees under the Classification Act" (*id.* at 5; see also *id.* at 8). And, in attempting to estimate the cost of the bill, Mr. Stahl explained that "[y]ou would have to know * * * the precise number of promotions from each grade to the next grade * * *. [Y]ou are dealing with over a million employees under the Classification Act * * *" (*id.* at 15; see also *id.* at 9).

Subsequent hearings on the 1962 amendment further confirm this understanding. Thus, as Chairman Dulski remarked in his opening statement, "[t]hese

bills would provide a formula for guaranteeing employees *under the Classification Act* a minimum salary increase when promoted *from one grade to another*. The purpose of this legislation is to require that, when *a classified employee is promoted*, he will receive an increase in compensation that is more realistic and more commensurate with the increased responsibilities he must assume in the higher grade." *1961 House Hearings, supra*, at 2 (emphasis added).[27] Representative Lesinski, the sponsor of one of the bills, explained that "[u]nder present law, *a classified employee who is promoted or transferred to a higher grade*, in most cases, receives a pay increase equal to at least a one-step increase *in the grade from which promoted*. * * * The simple objective of [the bill] is to make more realistic and more meaningful *promotions from one grade to a higher grade for employees under the Classification Act*" (*id.* at 3; emphasis added). Similarly, O. Glenn Stahl, again testifying on behalf of the Civil Service Commission, noted that the automatic salary increase is "an effort to make promotions from one grade to another * * * a little more meaningful" (*id.* at 6), and he emphasized that "[w]e are speaking now only of employees whose positions are subject to the Classifica-

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[27] The bills under consideration at the hearings—H.R. 1010, 87th Cong., 1st Sess. (1961), and H.R. 2015, 87th Cong., 1st Sess. (1961)—were indistinguishable in scope from the provision enacted into law as Section 604(a). See H.R. Conf. Rep. No. 2532, 87th Cong., 2d Sess. 61 (1962); S. Rep. No. 2120, 87th Cong., 2d Sess. 25 (1962). However, while H.R. 1010, like Section 604(a), called for a two-step increase, H.R. 2015 required that the salary be increased by the difference between the minimum rates of the grades in question. See also *1961 House Hearings, supra*, at 2 (statement of Rep. Dulski), 3 (statement of Rep. Lesinski), 7 (statement of O. Glenn Stahl).

tion Act. * * * [The bill is] limited to the Classification Act. It has no applicability to jobs not under the Classification Act" (*id.* at 6, 10; see also *id.* at 16-18).

In 1972, Congress again considered the pay systems for federal employees when it enacted Pub. L. No. 92-392, 86 Stat. 564, 5 U.S.C. 5341 *et seq.* The purpose of this legislation was to codify and standardize the prevailing-rate system, which had theretofore been governed largely by administrative regulation and practice. See S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972); H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971). Comparable to the authority granted by 5 U.S.C. 5334(a) with respect to the General Schedule, the statute authorized the Civil Service Commission to prescribe regulations under the Wage System "governing the administration of pay for individual employees on appointment, transfer, promotion, demotion, and other similar changes in employment status." 5 U.S.C. 5343(c)(5). In adopting this provision, Congress "intended to grant to the Commission the same authority which it now has under 5 United States Code 5334 with respect to employees paid under the General Schedule" (H.R. Rep. No. 92-339, *supra*, at 14). In particular, it was contemplated that "[t]he Commission's regulations [for the Wage System] may cover matters such as * * * application of the highest previous rate rule * * *" (*ibid.*). Thus, Congress expressly approved the "highest previous rate" rule, which the Commission had consistently used for more than 20 years to determine the salary level of an employee transferred or promoted from a prevailing-rate position to a GS position. This specific congressional endorsement of the Commission's practice flatly contradicts the Court of Claims' conclusion that

the provision for an automatic two-step increase, rather than the "highest previous rate" rule, was applicable to respondents' promotions from the Wage System to the General Schedule.[28]

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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[28] OPM has recently reiterated its view to Congress that a "person who has been a Federal employee, although excluded from the General Schedule, would have his or her pay set under the highest previous rate rule upon entry into the General Schedule." *Conversion of Nonappropriated Fund Employees to Competitive Service: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 20 (1980) (statement of Gary R. Nelson, Office of Personnel Management).

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